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(1)

Supreme Court, U.S.
FILED

10-496 OCT 9 - 2010

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No. _____

In the Supreme Court of the United States

ROBERT WHITE, PRO SE,

Petitioner;

v.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
Special Counsel for the Chapter 7 Trustee for
CK LIQUIDATION CORP,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does 11 U.S.C. §327 tolerate waivers of actual conflicts of interest between estate co-counsel and the Chapter 7 Trustee.

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PETIT ION FOR A WRIT OF CERTIORARI

Petitioner, Robert White – Pro Se (hereafter "White"), an unsecured creditor in this bankruptcy case, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

Only the Bankruptcy Appellate Panel for the United States Court of Appeals for the First Circuit (hereafter "BAP") published its opinion in this appeal [1]. The United States Court of Appeals for the First Circuit (hereafter "First Circuit Court of Appeals") declined to publish or issue an opinion and deferred to the BAP's published opinion instead. Likewise, the Bankruptcy Court for the Central District of Massachusetts did not issue an opinion or publish its decision in this appeal.

JURISDICTIONAL STATEMENT

The judgment of the First Circuit Court of Appeals was issued on July 14, 2010, affirming the judgment of the BAP, which was issued on July 6, 2009. The BAP affirmed the Bankruptcy Court's Orders granting Mintz & Levin's final fee award, which was entered on November 12, 2008. On July 26, 2010 White requested reconsideration en banc of the

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1 Petitioner's Appendix, pg. 2, BAP published opinion in this appeal.

July 14, 2010 judgment of the First Circuit Court of Appeals which went unanswered. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(l). The First Circuit Court of Appeals had jurisdiction to hear the appeal of the BAP's final judgement in this case pursuant to 28 U.S.C. §158(d)(1). White's Writ is timely because it was filed and served within 90 days after the entry of the judgment appealed.

FEDERAL STATUTES INVOLVED

The following three Title 11 US Code sections are involved in this appeal:

> 11 U. S. C. § 327. Employment of professional persons
>
> > (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.
> >
> > ...
> >
> > (c) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting

> the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

and,

> 11 U. S. C. § 101. Definitions
>
> In this title the following definitions shall apply:
>
> ...
>
> (14) The term "disinterested person" means a person that—
>
> ...
>
> (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

STATEMENT OF CASE

This is an appeal of the final fee award of special counsel to the chapter 7 estate, Mintz & Levin, who is Respondent [2]. White contends that Mintz & Levin has

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2 Petitioner's Appendix, pg. 18.

an unwaivable and actual conflict of interest which prohibits Mintz & Levin from receiving compensation for serving as special counsel to the chapter 7 estate. Mintz & Levin was retained by the Chapter 7 Trustee to defend the estate and prosecute and settle the Bankruptcy Court's sua sponte Federal Rule of Bankruptcy Procedure 9011 (hereafter "Rule 9011") sanction against the estate's largest creditor, Harold Bowers [3]. Mr. Bowers filed a motion to vacate the expedited non-plan sale (chapter 11 §363 sale) accusing estate counsel (debtor's counsel and creditors committee counsel) of fraud for understating their fees and overstating the amount of dividend available to unsecured creditors in order to obtain Mr. Bowers' consent to the sale [4]. At the preliminary hearing on Mr. Bowers' motion to vacate the Bankruptcy Court simultaneously scheduled an evidentiary hearing for Mr. Bowers' motion, with discovery, and issued an Order to Show Cause why Mr. Bowers should not be sanctioned pursuant to Rule 9011 for raising frivolous allegations [5]. In that Order to Show Cause the Bankruptcy Court ordered its sanction paid from Mr.

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3 Bankruptcy Court Docket (hereafter "BC Docket") #416 – Chapter 7 Trustee's Motion to Employ Mintz & Levin. All Bankruptcy Court Docket entries referenced in this Writ were designated into the record on appeal unless referenced as included in Appellant's BAP Appendix.

4 BC Docket # 371, Harold Bowers Motion to Vacate Due to Fraud on the Court

5 BC Docket # 412, Order to Show Cause Why Harold Bowers Should Not Be Sanctioned.

Bowers' portion of the dividend, which ultimately were paid to Mintz & Levin contrary to Rule 9011 (c)(2)'s instructions that sua sponte sanctions are to be paid to the court [6].

At the retention stage of employment, Mintz & Levin disclosed an actual conflict of interest with the other estate co-counsel, Sherin & Lodgen, who Mr. Bowers accused of fraud. Mintz & Levin's disclosure revealed that Sherin & Lodgen represented Mintz & Levin in at least two civil litigation cases outside bankruptcy which were pending during Mintz & Levin's defense of the estate over Mr. Bowers' fraud allegation against Sherin & Lodgen. Mintz & Levin, Sherin & Lodgen, and the Chapter 7 Trustee issued affidavits acknowledging and attempting to waive those conflicts [7] [8] [9], which the Bankruptcy Court accepted as curing the conflicts [10].

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6 White's appeal below pivoted on this issue of unlawful sua sponte attorney fee sanction issued pursuant to Rule 9011 (c)(1)(B); however, White's Writ of Certiorari focuses solely on Mintz & Levin's conflicts of interest in prosecuting the Bankruptcy Court's unlawful sanctions.

7 BC Docket # 439, Affidavit of Michael Gardner In Support of Retention of Mintz & Levin.

8 BC Docket # 441, Affidavit of Michael Goldberg in Support of Retention of Mintz & Levin.

9 BC Docket # 438, Response of Chapter 7 Trusee to Opposition to Retention of Mintz & Levin.

10 BC Docket #462, Minute Order granting Chapter 7 Trustee's Application to Employ Mintz & Levin.

FACTS AND HISTORY

Three years prior to petitioning for chapter 11 protection the Debtor (CK Liquidation Crop., f.k.a. CADKEY Corp., hereafter "CADKEY") lost a decade long copyright infringement lawsuit to Harold Bowers, and CADKEY suffered a judgment that had grown to $6 mil. with interest as of the petition date[11]. CADKEY filed its chapter 11 petition on August 22, 2003, and sold all its assets through an expedited non-plan sale [12] to one of its largest stockholders [13], Kubotek, a Japanese corporation. At the sale hearing, held on October 27, 2003, Kubotek committed perjury[14], could not secure a good faith finding, and decided to close the sale regardless. White appealed the sale all the way to this Court, case no. 05-8146, cert. denied. Mr. Bowers is the largest creditor to the estate and White is the second largest unsecured creditor with a $1.86 mil. claim [15].

The case converted to chapter 7 on March 4,

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11 Appellant's BAP Appendix, pg. 79, Claim 13 – Claims Register. Appellant's BAP Appendix was entered into the record during the BAP appeal of this case.

12 BC Docket #121 – Sale order.

13 Appellant's BAP Appendix, pg. 86, Question 21(b) - Debtor's Schedules , Stock Disclosure.

14 Appellant's BAP Appendix, pg. 44, ln. 4 – Docket #245: Transcript October 27, 2003 hearing after auction.

15 Appellant's BAP Appendix, pg. 80, Claim 17 – Claims Register.

2004, whereby White filed a motion to vacate the sale alleging that chapter 11 estate counsel committed fraud on the court and creditors [16] by promising a larger dividend than counsel knew was available at the time in order to obtain Mr. Bowers' consent to the sale. The Bankruptcy Court dismissed White's motion without an evidentiary hearing reasoning that White's initial appeal of the sale order was pending in District Court after the sale and that appeal and White's motion to vacate needed to be consolidated for jurisdictional reasons [17]. White then filed a motion to disgorge estate counsels' fees [18] in Bankruptcy Court, which drew sua sponte Rule 9011 attorney fee sanctions which the Bankruptcy Court ordered paid to the estate [19]. The Bankruptcy Court incarcerated White for contempt after he was unable to pay the $3,500 fine [20] as a lump sum and then released White from Federal Prison 42 days later after the Chapter 7 Trustee agreed to take title to White's two vehicles in leu of cash for the sanctions [21]. White appealed those sanctions through the BAP and on to the First Circuit

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16 BC Docket #313 - White's motion to vacate.

17 BC Docket #330 – Order denying White's motion to vacate.

18 BC Docket #348 – White's motion to disgorge.

19 BC Docket #386 – Order sanctioning White.

20 BC Docket #604 & 609 - Incarceration orders.

21 BC Docket # 618 - Incarceration release order.

Court of Appeals which dismissed the appeal as moot[22] because the Bankruptcy Court had purged White's sanctions and contempt while on appeal and ordered estate counsel (Sherin & Lodgen) and the Chapter 7 Trustee to pay White's sanctions instead [23].

Soon after White filed his motion to vacate Mr. Bowers filed nearly identical allegations of fraud against estate counsel in his own motion to vacate the sale [24]. The Bankruptcy Court scheduled an evidentiary hearing, allowed discovery, issued an order to show cause why Mr. Bowers should not be sanctioned pursuant to Rule 9011 [25], appointed Mintz & Levin as special counsel for the chapter 7 estate to replace Sherin & Lodgen (who was accused of fraud by Mr. Bowers), conducted a two day evidentiary hearing combining the Bankruptcy Court's sua sponte sanctions with Mr. Bowers' fraud allegations [26], and afterward sanctioned Mr. Bowers pursuant to Rule

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22 Appellant's BAP Appendix, pg. 34 - 1st Circuit 6/29/07 dismissal of White's sanction appeal.

23 Appellant's BAP Appendix, pg. 29 - Docket #705: Bankruptcy court order purging White of sanctions.

24 BC Docket #371 - Bowers' motion to vacate.

25 BC Docket #412 - Bankruptcy Court's Order to Show Cause pursuant to Rule 9011(c)(1)(B).

26 BC Docket #610, pg. 4, lns. 8-15, Bowers trial transcript, 1st day.

9011 [27]. The Bankruptcy Court continued the sanction hearing several times during the next six months after trial to determine the "amount ... [and] modality" of Mr. Bowers' sanctions [28]. Thereafter, in a stipulated agreement, the two chapter 11 estate counsel who Mr. Bowers accused of fraud took money judgments against Mr. Bowers for their attorney fees in the combined amount of $363,000 in accordance with the Court's purported authority to issue sua sponte attorney fee sanctions [29] and without either counsel moving for sanctions of their own pursuant to Rule 9011. Mintz & Levin in turn formulated a fee shifting scheme through the sanction settlement agreement to take its attorney fees out of Mr. Bowers' estimated portion of dividend before any of the remaining claims had been settled or disburse [30]. Mintz & Levin submitted an interim fee application in December of 2005, several months before the 2006 settlement agreement with Mr. Bowers was negotiated. Mintz & Levin was awarded $140K of their $270K requested for fees and costs up to and including Mr. Bowers' two day evidentiary hearing, and for litigating the Bankruptcy

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27 BC Docket #608, pg. 177, ln. 6 - pg. 179, ln. 19, Bowers trial transcript, 2nd day.

28 BC Docket #608, pg. 179, ln. 9.

29 BC Docket #767, pg. 8, pp. 22 - Bowers sanction settlement agreement.

30 BC Docket #767, exhibit A attached thereto, pp. 2, fee shifting formula.

Court's sua sponte sanctions afterward [31]. Subsequently, Mintz & Levin submitted $39K in additional fees and costs in their final fee application for negotiating a settlement with Mr. Bowers over the Bankruptcy Court's sua sponte Rule 9011 sanctions [32].

At Mintz &Levin's final fee hearing the Bankruptcy Court said it initially denied half of Mintz & Levin's interim fee application due to Mintz & Levin's "over staffing" [33] and the Court said it intended that denial to be permanent [34]. However, the Bankruptcy Court went on to award Mintz & Levin $39K more in fees billed during the second interim period for negotiating a settlement with Mr. Bowers over the Court's sanctions [35]. White objected to Mintz & Levin's $314,000 in final fees [36] whereby the Bankruptcy Court awarded $180K of the $314K

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31 Appellant's BAP Appendix, pg. 27 – Docket #684 - Order allowing in part Mintz & Levin's 1st interim fee application.

32 BC Docket #850 - Mintz & Levin final fee application.

33 Appellant's BAP Appendix, pg. 24, ln. 7 – Docket #891: Transcript Mintz & Levin final fee hearing.

34 Appellant's BAP Appendix, pg. 12, ln. 12 – Docket #891: Transcript Mintz & Levin final fee hearing.

35 Appellant's BAP Appendix, pg. 12, ln. 15 - 17 – Docket #891: Transcript Mintz & Levin final fee hearing.

36 BC Docket #851, 853, & 873 – White's objection to Mintz & Levin final fee application with two amendments.

requested [37] .

ARGUMENT

Summary

In order to evaluate Mintz & Levin's conflict of interest the basis of their fees must be examined. Mintz & Levin was hired to defend the estate and to prosecute and settle the Bankruptcy Court's sua sponte Rule 9011 sanctions. Mintz & Levin applied for fees pursuant to 11 U.S.C. §330, however Mr. Bowers was paid to settle the Bankruptcy Court's sua sponte sanctions pursuant to Rule 9011. Neither the Chapter 7 Trustee nor Mintz & Levin petitioned the Court for relief of their own pursuant to Rule 9011.

Most Federal Circuit Courts in the United States recognize that sua sponte Rule 9011 sanctions must be paid to the Court, not to counsel. See *In re DeVille*, 361 F.3d 539 (9th Cir. 2003), explaining:

> Under Rule 9011, a court may award "an appropriate sanction" on its own motion, if it first issues an order to show cause describing the specific misconduct. Fed. R. Bankr. P. 9011(c)(1)(B). Rule 9011(c) sets forth the available sanctions, and limits any monetary sanction that is imposed pursuant to a sua sponte order to a penalty payable to the court. Shubov, 253 B.R. at 546; Fed. R. Civ. P. 11, Advisory Committee Notes to 1993 Amendments. Therefore, the Bankruptcy Court did not have authority to

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37 BC Docket #876 - Order allowing in part Mintz & Levin's final fees.

> award attorneys' fees to Cardinale as a sua sponte sanction under Rule 9011.

Similarily, in ***YOUNG v. U.S. EX REL. VUITTON ET FILS S. A.*, 481 U.S. 787, at 788,** this Court recognized one party to civil litigation can not be paid to prosecute another party over the court's sanctions:

> District courts have authority to appoint private attorneys to prosecute criminal contempt actions....
> Counsel for a party that is the beneficiary of a court order may not be appointed to undertake criminal contempt prosecutions for alleged violations of that order. A private attorney appointed to prosecute a criminal contempt should be as disinterested as a public prosecutor, since the attorney is appointed solely to pursue the public interest in vindication of the court's authority. In a case where a prosecutor also represents an interested party, however, the legal profession's ethical rules may require that the prosecutor take into account an interest other than the Government's. This creates an intolerable danger that the public interest will be compromised and produces at least the appearance of impropriety. The fact that the judge makes the initial decision to proceed with a contempt prosecution is not sufficient to quell concern that the interested prosecutor may be influenced by improper motives, since the prosecutor

> exercises considerable discretion in matters that are critical to the case but outside the court's supervision. The requirement of a disinterested prosecutor is consistent with this Court's earlier decisions recognizing that prosecutors need not be as disinterested as judges.

Therein lies the reason why Mintz & Levin's final fee award must be reversed. The Bankruptcy Court appointed conflicted counsel to prosecute and settle its sua sponte Rule 9011 sanctions and then awarded attorney fees as sanctions paid from estate funds instead of ordering the frivolous filer to pay the court; thus depleting the dividend for other unsecured creditors.

Mintz & Levin contends it was paid to defend the estate against Mr. Bowers' effort to vacate the §363 sale. White contends Mintz & Levin was paid for litigating and settling the Bankruptcy Court's sua sponte Rule 9011 sanctions. However, neither explanation justifies fees because Mintz & Levin was clearly conflicted, can not waive its conflicts, and is not entitled to fees for any reason.

Mintz & Levin Admitted to Its Conflicts of Interest

Mintz & Levin admits to its actual conflicts of interest in its retention affidavit:

> 1. I am a member of the firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. ("Mintz Levin" or the "Firm") ...

2. As disclosed in the Mikels Affidavit dated January 12, 2005, Mintz Levin is represented by Sherin and Lodgen LLP ("Sherin and Lodgen") in matters unrelated to this bankruptcy...

...

4. The Sherin and Lodgen Representation consists of two lawsuits brought by former clients against the Firm, one of which is still pending and the other of which is in the process of being dismissed. ...

5. Sherin and Lodgen also represents a member of Mintz Levin, in his individual capacity, in a lawsuit relating to work performed at a prior firm. Mintz Levin is not a party to this lawsuit. ...

(See, BC Docket # 439, Affidavit of Michael Gardner In Support of Retention of Mintz & Levin.)

Sherin and Lodgen further admits to its actual conflicts of interest and attempts to waive them:

1. I am a partner of the firm of Serin and Lodgen LLP....

2. As disclosed in the Mikels Affidavit dated January 12, 2005, Mintz Levin is represented by Sherin and Lodgen in matters unrelated to this bankruptcy.

3. I understand that as the client in the attorney-client relationship described in the foregoing paragraph, Mintz Levin is under no profession obligation to refrain from

> pursuing legal actions of any kind against Sherin and Lodgen on behalf of its clients, including the Chapter 7 Trustee in the above-captioned case.
> 4. I understand that, should Mintz Levin determine that is in the best interest of the estate to pursue any claims against Sherin and Lodgen, including any claims of fraud on the court, Sherin and Lodgen's existing representation of Mintz Levin would not prohibit investigation into, or the bringing of such claims. Sherin and Lodgen hereby consents to the representation of the Trustee by Mintz Levin in such action.
> (See BC Docket # 441, Affidavit of Michael Goldberg in Support of Retention of Mintz & Levin.)

The Chapter 7 Trustee acknowledged estate co-counsels' actual conflicts of interest and also attempts to waive their conflicted representation:

> John A. Burdick, Jr, the duly-appointed Chapter 7 Trustee of the debtor CK Liquidation Corporation (f/k/a CADKEY Corporation) (the "Trustee") hereby files this response ...
> ...
> 2. The Trustee submits that the disclosures made in the Mikels Affidavit meet the disclosure requirements contained in the Bankruptcy Code, the Bankruptcy Rules, and the Local Bankruptcy Rules ...

Nevertheless, the Gardener Affidavit, filed contemporaneously herewith, contains additional disclosures on the issues requested by Bowers in the Bowers Objection. Further, the Goldberg Affidavit, filed contemporaneously herewith, evidences that Mintz Levin will not be restrained from taking any actions against Sherin and Lodgen LLP ("Sherin and Lodgen") in the event such action are appropriate and within the scope of Mintz Levin's employment as authorized by the Court.

...

7. Based on the present state of the record, the Trustee does not believe that an action alleging a fraud perpetrated on the Court has merit. ...

8. If the facts and circumstances change so that the Trustee believes it is in the best interest of the estate to pursue a claim, or claims, against Sherin and Lodgen, the Affidavit of Michael Goldberg, filed contemporaneously herewith, makes clear that Mintz Levin is available to pursue any such remedy.

(See BC Docket # 438, Response of Chapter 7 Trusee to Opposition to Retention of Mintz & Levin. [38])

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38 BC Docket #422, Opposition to Retention of Richard Mikels. Mr. Bowers filed formal opposition to Mintz & Levin's retention as estate counsel due to their disclosed conflicts,

This kind of conflicted cross-representation is clearly prohibited under 11 U. S. C. § 327 and by the American Bar Association's Model Rules of Professional Conduct, Rule 1.7:

> Model Rules of Professional Conduct
>
> *Client-Lawyer Relationship*
> Rule 1.7 Conflict Of Interest: Current Clients
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.
>
> ...
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or

other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Observing that Rule 1.7 (b) is conjunctive, each requirement in (1) - (4) must be met in order for the Rule to vindicate the representation whereas the party's waivers of Mintz & Levin's conflicts violates each of the requirements.

Mintz & Levin's Representation of the Estate Violated Mode Rule 1.7(b)(1)

According to *Hilti, Inc. v. HML Development Corp.*, 2007 WL 809792, at 26 (Mass.Super. 2007) an attorney can not serve two masters:

> [L]oyalty to a client is considered to be impaired when the lawyer 'cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests'.

Mintz & Levin could not possibly be expected to prosecute its own attorney while being represented by that counsel outside the current case; therefore, Mintz & Levin could not give diligent representation to the estate.

Mintz & Levin's Representation of the Estate Violated Mode Rule 1.7(b)(2)

The precedential case most often cited for establishing the definition of conflicts of interest in bankruptcy is *In re Roberts*, 46 B.R. 815, 826-27 (Bankr. D. Utah 1987) :

> "to hold an interest adverse to the estate" means:
>
> ...
>
> (2) to possess a predisposition under circumstances that render such a bias against the estate.

It is unreasonable to suggest Mintz & Levin did not hold a bias in favor of its counsel accused of fraud and thus against the estate.

Mintz & Levin's Representation of the Estate Violated Mode Rule 1.7(b)(3)

The Chapter 7 Trustee asserted Sherin & Lodgen could waive prosecution by Mintz & Levin inside bankruptcy while Sherin & Lodgen represented Mintz & Levin in civil litigation outside bankruptcy. This is exactly the kind of conflicted cross-representation Model Rule 1.7 (b)(3) intends to prohibit.

Mintz & Levin's Representation of the Estate Violated Mode Rule 1.7(b)(4)

According to *John Pearson v. First Nh Mortgage Corporation*, 200 F3d 30, at pp. 54 (1st Cir. 1999) estate counsel must abide by the Model Rules of Professional Conduct and are not free to authorize their own conflicted representation:

> First, under the governing ethical rules, some conflicts of interest are considered so fundamental that even an anxious prospective client is deemed incapacitated from providing informed consent. See, e.g., NHRPC 1.9; Kevlik, 724 F.2d at 850-51. "'[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.'" Kelley's Case, 627 A.2d 597, 600 (N.H. 1993) (quoting Comments, ABA Model Rule 1.7(b)) (emphasis added).

Sherin & Lodgen is incapable of giving informed consent releasing Mintz & Levin to prosecute Sherin & Lodgen inside bankruptcy. Likewise, the parties fail to realize Mintz & Levin is required to and also unable to give informed consent releasing Sherin & Lodgen from "diligent representation" outside bankruptcy. Waivers are prohibited more by the Rules and circumstances in this case than by the

parties.

SUMMARY

Actual conflicts of interest are not to be tolerated in bankruptcy according to *Woods v. City Nat. Bank & Trust Co.of Chicago*, 312 U.S. 262, at 268. :

> Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation.

Courts are remiss in tolerating actual conflicts of interest by a trustee, see *Diane Denmark v Liberty Life Assurance Company of Boston* (*Denmark* II)(1st Cir. May 2009):

> courts are duty-bound to inquire into what steps a [trustee] has taken to insulate the decision making process against the potentially pernicious effects of structural conflicts.

Prevailing ethical principles not only justify, but require, disqualification of Mintz & Levin's fees. See *In re Bushkin Associates, Inc.*, 864 F.2d 241, 246 (1st Cir. 1989) (disqualification is an entirely necessary measure to ensure the "integrity of the judicial process, enforce [the court's] rules against transgressors, and maintain public confidence in the legal profession.")

WHITE'S WRIT SHOULD BE GRANTED

In this case the First Circuit Court of Appeals declined to publish and instead allowed a published opinion by its BAP to endorse issuance of conflict waivers between estate co-counsel to cure actual conflicts of interest clearly prohibited by Model Rules of Professional Conduct and 11 U. S. C. § 327. This Court should exercise its supervisory authority over the US Circuit Courts of Appeals and correct this unlawful practice of estate counsel attempting to waive their actual conflicts of interest in bankruptcy court.

Respectfully submitted on October 8, 2010, by

Robert L White

Robert White - pro se

(2)

Supreme Court, U.S.
FILED

10-496 OCT 9 - 2010

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Petitioner;

v.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
Special Counsel for the Chapter 7 Trustee for
CK LIQUIDATION CORP,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the First Circuit

PETITIONER'S APPENDIX

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First Circuit Court of Appeals Judgment Affirming BAP Judgment

United States Court of Appeals
For the First Circuit

No. 09-9020

IN RE: CK LIQUIDATION CORPORATION,
d/b/a Baystate Technologies, Inc., f/k/a Cadkey Corporation,

Debtor,
ROBERT WHITE,
Appellant,
v.
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C.,
Appellee.

Before
Lynch, Chief Judge,
Boudin and Stahl, Circuit Judges.

JUDGMENT
Entered: July 14, 2010

We have reviewed the record in this case, including the briefs of the parties. Essentially for the reasons given by the Bankruptcy Appellate Panel, we affirm the final fee order and the imposition of sanctions. We note only the following. The record indicates that appellee's actions in this case were in accord with purposes for which it was retained. Therefore, it is entitled to reimbursement for fees and expenses incurred.
Affirmed.

BAP Opinion Affirming
Bankruptcy Court Order

FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP NO. MS 08-089

Bankruptcy Case No. 03-44906-HJB

CK LIQUIDATION CORPORATION,
Debtor.

ROBERT WHITE,
Appellant,
v.
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Henry J. Boroff, U.S. Bankruptcy Judge)

Before
Haines, Votolato, and de Jesús,
United States Bankruptcy Appellate Panel Judges.

Robert White, pro se, on brief for Appellant.
Richard E. Mikels, Esq., and Charles W. Azano, Esq., on brief for Appellee.

July 2, 2009

Votolato, U.S. Bankruptcy Appellate Panel Judge.

Robert White (the "Appellant"), an unsecured creditor of CK Liquidation Corporation (the "Debtor"), appeals pro se from the bankruptcy court's order ("Final Fee Order") allowing in part the final application filed by Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. ("Mintz Levin"), for fees and expenses incurred as special counsel to the chapter 7 trustee. The Appellant does not challenge the reasonableness of the fees and costs awarded. Rather, he argues that the bankruptcy court's award of any fees or costs to Mintz Levin constituted legal error. For the reasons discussed below, we conclude that the arguments and issues raised by the Appellant are without merit and that the bankruptcy court did not err in awarding the fees and costs disputed. Therefore, the order appealed from is AFFIRMED.

BACKGROUND

A. Mintz Levin's involvement in the case

The Debtor filed a chapter 11 case in August 2003 and, shortly thereafter, requested an order authorizing the sale of substantially all of its assets. The Appellant objected to the sale, the bankruptcy court overruled his objection, and the property was sold to Kubotek Corporation in December 2003 in accordance with the order authorizing the sale (the "Sale Order").1 Another pro se creditor, Harold L.

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1 The Sale Order was affirmed by the U.S. District Court for the District of Massachusetts (Case No. 4:03-cv-

Bowers, had also objected to the sale, but that objection was resolved in a settlement with the unsecured creditors committee and others. The chapter 11 case was subsequently converted to chapter 7, and John A. Burdick, Jr., was appointed as trustee.

The Appellant and Bowers separately sought to vacate the Sale Order through a litany of motions and objections.2 In one such motion (the "Fraud Motion"), Bowers alleged, among other things, that two law firms, Ropes & Gray, LLP ("R&G"), and Sherin and Lodgen, LLP ("S&L"), had committed "fraud in the inducement of the settlement" and "fraud on the court." At the time Bowers filed the Fraud Motion, S&L was serving as counsel to the Trustee. Because the Fraud Motion included allegations against S&L in its role as counsel to the creditors' committee during the chapter 11, the Trustee felt it appropriate to hire separate counsel in connection with the Fraud Motion, so he requested and was authorized to retain Mintz Levin as special counsel to represent the estate with respect to the Fraud Motion and "in connection with any matters

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40279), the U.S. Court of Appeals for the First Circuit (Case No. 05-1060), and the Appellant's petition for writ of certiorari was denied by the U.S. Supreme Court.

2 The Appellant has also filed at least six appeals of other bankruptcy court orders in this case, all of which have been rejected. He pursued four of those appeals to the First Circuit and two to the U.S. Supreme Court, where certiorari was denied.

incident to, or related to, the subject matter of the [Fraud] Motion."

During a preliminary hearing, Bowers requested, and was granted, an evidentiary hearing on the Fraud Motion, however, the bankruptcy judge cautioned Bowers that if his actions were determined to be frivolous, sanctions would be imposed, and a show cause order to that effect was issued. Bowers opted to proceed with the hearing, which was held on June 9-10, 2005.

As Trustee's counsel, Mintz Levin investigated the allegations raised in the Fraud Motion, conducted discovery, including depositions of numerous parties, and represented the estate at the two-day evidentiary hearing. At the conclusion, the bankruptcy court determined that the motion lacked merit, that Bowers had violated Fed. R. Bankr. P. 9011, and that sanctions were warranted. The bankruptcy court left open the sanctions issue, and scheduled a further hearing on that.

While the sanctions issue was pending, extensive negotiations were held between the Trustee, Bowers, and numerous other parties, and a global settlement agreement was reached and approved by the bankruptcy court resolving all of the issues raised by Bowers in the Fraud Motion, as well as all other issues between Bowers and the estate.3

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3 As part of the settlement, Bowers agreed, among other things, that: (1) a portion of the distribution to which he would be entitled on his unsecured claim (as calculated pursuant to an agreed-to formula) would instead be distributed to general unsecured creditors to compensate

The settlement also resolved claims that other parties were threatening to bring against Bowers. Bowers has not filed any additional motions or pursued any appeals since entering into the global settlement.

B. Mintz Levin's fee applications

Mintz Levin's first fee application (the "First Interim Fee Application") requested fees in the amount of $268,555.00 and expenses of $6,255.08. The bankruptcy court entered an order ("First Fee Order") allowing fees on an interim basis in the reduced amount of $134,277.50 and expenses of $6,055.48.

In August 2008, Mintz Levin filed a final fee application ("Final Fee Application") seeking final approval of fees and expenses totaling $314,108.54, comprised of the following: (1) $140,332.98, for fees and expenses allowed by the First Fee Order; (2) $134,277.50 for fees and expenses not awarded in the First Fee Order; (3) $38,038.00 for fees and expenses incurred after the period covered by the First Fee Order; and (4) an estimated $2,500 for anticipated fees associated with the hearing on the Final Fee Application. The Appellant objected. At

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them for the increased administrative costs that resulted from defending the estate against Bowers' claims; (2) the next $35,000 of Bowers' claim would be distributed to Bowers; and (3) any amounts remaining on Bowers' claim would be distributed in agreed-to percentages to other parties affected by Bowers' actions.

the conclusion of the hearing, the bankruptcy court entered the Final Fee Order allowing Mintz Levin's fees in the reduced amount of $180,871.04, representing the sum of the amounts listed in subparts (1), (3), and (4) above. The bankruptcy court explained its reduction of the requested fees as follows:

> With respect to the Mintz Levin application, I have absolutely no quarrel with the results obtained with the fine and professional work that was done by that firm. I did reduce the first application in half because I thought that in light of the issues that were presented, that it was simply over-staffed, and I strongly suspect that Mintz Levin's counsel disagrees with that, but I did seem to think that notwithstanding the fine effort made, that there were simply too many people at Mintz Levin that were stirring that pot.

The Appellant appealed the Final Fee Order. Mintz Levin filed a cross-appeal, but has since voluntarily withdrawn the appeal. See BAP No. MS 08-092.

JURISDICTION

Before addressing the merits of an appeal, the Panel must determine that it has jurisdiction, even if the issue is not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998). The Panel has jurisdiction to hear appeals from: (1) final judgments, orders, and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," id. at 646 (citations omitted), whereas an interlocutory order "only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). A bankruptcy court's order allowing or disallowing a professional's final fee application is a final order. See In re Bank of New England, 142 B.R. 584, 585 (D. Mass. 1992). The Panel clearly has jurisdiction to hear this appeal.

STANDARD OF REVIEW

We review the bankruptcy court's findings of fact for clear error, and conclusions of law *de novo*.

See TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995); Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719-20 n.8 (1st Cir. 1994). The Appellant argues that the bankruptcy court committed legal errors. Therefore, the Panel's review here is *de novo*.

DISCUSSION

The Appellant does not challenge the reasonableness of Mintz Levin's hourly rates, the time spent on this matter, or the amount of the Final Fee Order. Rather, he argues that the bankruptcy court committed legal error in awarding *any* fees or costs to Mintz Levin, and then purports to raise the following issues on appeal:4

1. Did the Bankruptcy Court violate [the Appellant]'s 1st, 5th, 7th, 8th, 9th, and 10th amendment rights, as well as violate the "Bankruptcy Power" clause of the US Constitution, by awarding Mintz Levin fees to prosecute the Court's sua sponte sanctions against another creditor.

2. Did the Bankruptcy Court commit legal err[or] by awarding Mintz Levin fees to prosecute the Court's sua sponte sanctions leveled against a creditor

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4 The issues as stated are not paraphrased. They are the words of the Appellant -- verbatim.

without the estate moving for its own sanctions.

3. Was Mintz Levin conflicted, adverse, and not disinterested per se while defending the estate against a creditor's fraud allegation leveled against another yet contemporaneous estate counsel while Mintz Levin was concurrently represented by that other estate counsel in litigation outside this bankruptcy case.

4. Did the Bankruptcy Court commit legal err[or] by deciding the chapter 7 estate had a duty to defend a § 363 sale to a prejurious buyer who failed its good faith finding and by deciding the chapter 7 estate derive[d] a benefit from defending such a sale from collateral attack by the estate's largest creditor.

5. Did the Bankruptcy Court commit legal err[or] by awarding Mintz Levin fees to prosecute the largest creditor for sua sponte sanctions for raising fraud allegations against chapter 11 estate counsel after the evidence at trial showed that chapter 11 counsel failed to disclose their $275,000 retainers as property of the estate when accounting to creditors and the Court at the sale

hearing regarding the benefit of the sale to creditors.

We will address each issue in turn.

I. Did the Bankruptcy Court violate [the Appellant]'s 1st, 5th, 7th, 8th, 9th, and 10th amendment rights, as well as violate the "Bankruptcy Power" clause of the US Constitution, by awarding Mintz Levin fees to prosecute the Court's sua sponte sanctions against another creditor?

The Appellant argues that the Final Fee Order violates his "first amendment right to redress because the Bankruptcy Court substituted [his] interests in the estate for that of the Court's." He also argues that Mintz Levin's "concurrent representation of the estate while prosecuting the Bankruptcy Court's sua sponte sanctions denies [his] right to due process by promoting conflicting representation, undermines a fair and impartial trial, leads to excessive fines imposed upon the estate as attorneys fees, disrespects the estate's right to independence (1st, 5th, 7th, 8th, 9th, and 10th Amendment rights respectfully [sic]), and is implied or lawful under the Bankruptcy Powers clause of the US Constitution." The Appellant then completely fails to adequately explain or address in any rational way how his constitutional rights were violated.

In addition, the Appellant's argument is based upon the erroneous premise that Mintz Levin was retained to "prosecute the court's sua sponte

sanctions" against Bowers. This characterization is inaccurate and misleading, the cases cited by the Appellant are not applicable, and the Appellant's citation to said cases may itself be sanctionable. Mintz Levin was retained by the Trustee to represent the estate in connection with any issues incident or related to the subject matter of Bowers' Fraud Motion, and the services resulted in a court approved settlement of all of the issues raised in or arising out of the Fraud Motion. Through the settlement agreement, which resolved all issues relating to Bowers' claims, and as part of the consideration for Bowers releasing said claims, all parties to the settlement agreed to release Bowers regarding the sanctions issue. The services that the Appellant characterizes as "prosecuting the Court's sua sponte sanctions" were largely Mintz Levin's efforts to achieve the settlement agreement, which is well within the scope of Mintz Levin's retention order, and conferred a benefit to the estate.5 Also fatal to the Appellant's cause, the amount of compensation awarded was not preserved as an issue on appeal, and, therefore, that issue is waived.

II. Did the Bankruptcy Court commit legal err[or] by awarding Mintz Levin fees to prosecute the Court's sua sponte sanctions leveled against a creditor without the estate moving for its own sanctions?

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5 See bankruptcy court's comments at 5, infra.

The Appellant argues, without merit or support, that Mintz Levin should not have been awarded its fees and expenses because of an unidentified procedural error relating to the sanctions issue. The bankruptcy court clearly has authority to impose sua sponte sanctions, pursuant to Fed. R. Bankr. P. 9011. Furthermore, a party in the case, Kubotek Corporation, did file a motion for sanctions against Bowers under Fed. R. Bankr. P. 9011(c)(1)(A). Regardless, no monetary sanctions were ever imposed by the court against Bowers, and all issues raised by or against Bowers were resolved by the global settlement agreement, which involved consideration and mutual releases. Therefore, in addition to being totally without merit from the outset, the Appellant's appeal is now moot.

III. Was Mintz Levin conflicted, adverse, and not disinterested per se while defending the estate against a creditor's fraud allegation leveled against another yet contemporaneous estate counsel while Mintz Levin was concurrently represented by that other estate counsel in litigation outside this bankruptcy case?

The Appellant argues that Mintz Levin was conflicted and not disinterested because it was represented by S&L in litigation outside of the bankruptcy case, and as a result Mintz Levin "is disqualified from receiving attorneys' fees according to § 327(a) and § 328(c)."

Section 327(a) provides that "the trustee, with the court's approval, may employ one or more

attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. § 327. The bankruptcy court may deny allowance of compensation if, at any time during such employment, the professional is not disinterested or holds an interest adverse to the interest of the estate. 11 U.S.C. § 328.

A "disinterested person" within the meaning of § 101(14) of the Bankruptcy Code is one who is "not a creditor, an equity shareholder, or an insider," nor presently, or within two years before bankruptcy, "a director, officer, or employee of the debtor," and does not have "an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders" for "any reason." 11 U.S.C. § 101(14). The phrase "interest materially adverse to the interest of the estate" is not defined in the Code. The First Circuit interprets those words to mean "the possessing or asserting of any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant or possessing a predisposition under circumstances that render such a bias against the estate real." Kagan v. Stubbe (In re El San Juan Hotel Corp.), 239 B.R. 635, 646 (B.A.P. 1st Cir. 1999), aff'd, 230 F.3d 1347 (1st Cir. 2000).

Bankruptcy courts are accorded wide discretion in determining whether a conflict of interest exists, see In re Martin, 817 F.2d 175, 182 (1st Cir. 1987), and appellate courts should give

appropriate deference to the bankruptcy court's "front line" position, because the bankruptcy judge is in the best position to gauge the ongoing interplay of factors and to make what is often a very fact driven judgment call. "If [the bankruptcy judge] perceives a materially adverse interest, he has at his disposal an armamentarium of permissible remedies, including (but by no means limited to) disqualification, disallowance of all or some fees, and invalidation of the security interest." Drew v. Latimer, Biaggi, Rachid & Godreau (In re El Comandante Mgmt. Co., LLC), 395 B.R. 807, 817 (D.P.R. 2008) (citing In re Martin, 817 F.2d at 182-83).

Here, Bowers (not the Appellant) objected to the Trustee's motion to retain Mintz Levin, alleging that Mintz Levin failed to fully disclose the nature of the relationship and alleged conflicts of interest involving Mintz Levin and S&L. The Trustee filed a response which included an affidavit by Michael S. Gardener, Esq., of Mintz Levin, describing in detail the connection between Mintz Levin and S&L. Specifically, he stated that S&L represents Mintz Levin in two lawsuits brought by former clients against the firm, and that neither case involves bankruptcy issues or this bankruptcy case. The Trustee also submitted an affidavit by Michael J. Goldberg, Esq., of S&L stating that as the client, Mintz Levin was not inhibited from pursuing S&L, and that "should Mintz Levin determine that it is in the best interest of the estate to pursue any claims against [S&L]," the current representation "would not prohibit investigation into, or the bringing of, such claims." The bankruptcy judge determined that

there was no disqualifying conflict of interest, overruled Bowers' objection, and, in the exercise of his discretion, approved Mintz Levin's retention. The Appellant does not address the manner in which the bankruptcy judge either abused his discretion or committed an error of law in overruling Bowers' objection to Mintz Levin's retention. This Panel had been given no basis for and sees no independent reason to disturb the bankruptcy court's ruling.

Finally, the Appellant neither objected to the Trustee's motion to retain Mintz Levin, nor did he appeal from the bankruptcy court's order granting the motion, and, if he ever did have standing, thetime for filing such an appeal expired a long time ago.

IV. Did the Bankruptcy Court commit legal err[or] by deciding the chapter 7 estate had a duty to defend a § 363 sale to a prejurious buyer who failed its good faith finding and by deciding the chapter 7 estate derive[d] a benefit from defending such a sale from collateral attack by the estate's largest creditor?

By raising this issue, the Appellant disingenuously and transparently attempts to use this appeal as a vehicle to again challenge the Sale Order. The Appellant has unsuccessfully ra ised these issues many times, through a litany of motions in the bankruptcy court, the U.S. District Court for the District of Massachusetts, and the U.S. Court of Appeals for the First Circuit, and they cannot be relitigated now through an appeal of the bankruptcy

court's award of fees and expenses to Mintz Levin. The Appellant's argument as to this issue is completely without merit, is frivolous, and deserves no further comment.

V. Did the Bankruptcy Court commit legal err[or] by awarding Mintz Levin fees to prosecute the largest creditor for sua sponte sanctions for raising fraud allegations against chapter 11 estate counsel after the evidence at trial showed that chapter 11 counsel failed to disclose their $275,000 retainers as property of the estate when accounting to creditors and the Court at the sale hearing regarding the benefit of the sale to creditors?

The Appellant argues that it was error for the bankruptcy court to award Mintz Levin fees and expenses for services performed in opposing the Fraud Motion. Again, this is another poorly veiled attempt to challenge the Sale Order and to relitigate both his own motion to vacate the Sale Order, and the Bowers Fraud Motion. These issues have been so over-litigated that they deserve no further discussion before this or any other forum. Therefore, the appeal as to this issue is without merit and is also dismissed as frivolous.

CONCLUSION

For the reasons discussed above, we conclude that the bankruptcy court committed no legal error or abuse of discretion in awarding attorneys' fees and costs to Mintz Levin. Accordingly, the Final Fee Order is AFFIRMED.

The Panel awards double costs to Mintz Levin. The Appellant is ordered to submit an accounting of costs on or before July 23, 2009. See Fed. R. Bankr. P. 8014.

Bankruptcy Court Minute Order
Granting Fees in Part

UNITED STATES BANKRUPTCY COURT, DISTRICT OF MASSACHUSETTS
Proceeding Memorandum/Order of Court

In Re: CK Liquidation Corporation Case Number: 03-44906 Ch: 7

MOVANT/APPLICANT/PARTIES:
#850 Final Application of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC for Compensation and Expenses as Special Counsel to the Chapter 7 Trustee

OUTCOME:
____Granted____Denied____Approved___ Sustained
____Denied____Denied without prejudice____Withdrawn in open court____Overruled
____OSC enforced/released
____Continued to:_____For:_____
____Formal order/stipulation to be submitted by:_____Date due:_____
____Findings and conclusions dictated at close of hearing incorporated by reference
____Taken under advisement: Brief(s) due_____From_____
Response(s) due_____From_____
____Fees allowed in the amount of: $_____Expenses of: $_____
____No appearance/response by:_____
__✓__DECISION SET OUT MORE FULLY BY COURT AS FOLLOWS:

ALLOWED IN THE AMOUNT OF $180,871.04, OF WHICH $140,332.98 HAS BEEN PAID.

IT IS SO NOTED:

_____
Courtroom Deputy

IT IS SO ORDERED:

_____Dated: 11/12/2008
Henry J. Boroff, U.S. Bankruptcy Judge

175 (3)

No. 10 - 496

Supreme Court, U.S.
FILED
NOV 19 2010
OFFICE OF THE CLERK

In the Supreme Court of the United States

ROBERT WHITE, PRO SE,

Petitioner,

v.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
Special Counsel for the Chapter 7 Trustee for
CK LIQUIDATION CORP,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the First Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

Robert White - pro se
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Manteca, CA 95336
(209) 823-0540

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Petitioner's Supplemental Brief

Petitioner, Robert White (hereafter "White"), submits this Supplemental Brief to notify this Court of two important developments in this case which occurred after White filed his writ of certiorari.

The Bankruptcy Judge Recused Himself Sua Sponte

On October 1, 2010, while White's motion for reconsideration en banc to the First Circuit Court of Appeals was pending, the original Bankruptcy Judge for the past seven (7) years in this case, the Honorable Henry J. Boroff, recused himself sua sponte [1], without notice [2], motion, or a hearing. White discovered Judge Boroff's recusal on November 10, 2010, well after filing his writ of certiorari, while reviewing the bankruptcy docket in preparation for filing White's reply brief.

Additionally, and also too late to disclose in White's writ of certiorari, the First Circuit Court of Appeals finally ruled on White's motion for reconsideration en banc, denying that request [3] on November 1, 2010, exactly one month after Judge Boroff recused himself.

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1 Attached hereto as Addendum #1.

2 The bankruptcy notice center only sent notice of Judge Boroff's recusal to the debtor. Judge Boroff copied his recusal order to the debtor and its counsel, US Trustee, chapter 7 trustee, and unsecured creditors committee counsel.

3 Attached hereto as Addendum #2.

Lateness and Lack of Notice of Judge Boroff's Recusal Violates White's Right to Due Process

Judge Boroff recused himself, without sufficient notice, while White's motion for reconsideration en banc was still pending before the First Circuit Court of Appeals. Both White and the Circuit Court should have been noticed of Judge Boroff's recusal. Lack of notice and such a late recusal has denied White his right to make Judge Boroff's recusal an issue on appeal to the Circuit Court and this Court.

Judge Boroff Self Recusal Was Late

Most circuits require that a motion for disqualification be brought at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim, see *Pontarelli v. Stone*, 978 F.2d 773 (1st Cir. 1992). Certainly the same requirement for promptness applies to self recusal. Judge Boroff waited two years to recuse himself after entry of this last order in this case, which was Mintz & Levin's final fee award, which is the subject of White's writ of certiorari. The Bankruptcy Court docket in this case has been devoid of any activity whatsoever for the past two years since entry of Mintz & Levin's final fee award except for entries related to this appeal (and now Judge Boroff's recusal). No new parties have appeared in this case since the appointment of the successor trustee in 2006 or the appointment of Respondent in 2005.

The most logical conclusion to be drawn from these facts is that Judge Boroff's sua sponte recusal indicates he was concerned over the appearance of impropriety in the way he adjudicated Mintz & Levin's final fees, given no new parties or issues have surfaced in this case during the past two years that might precipitate such deep introspection leading to self recusal. It is a consequence of timing, and not just a coincidence, that Judge Boroff's recusal implicates the impropriety of his final fee award to Mintz & Levin pursuant to 28 U.S.C. § § 455(a) or (b)(1). It is axiomatic that "justice delayed is justice denied" and Judge Boroff's recusal two years after the event which precipitated the appearance of impropriety is a failure to recuse in a timely manner.

Judge Boroff Recusal Voids His Orders Issued Immediately Prior to His Sua Sponte Recusal

In *Liljeberg v.Health Services Acquisition Corp.*, 486 U.S. 847 (1988) this Court held that Federal Rule of Civil Procedure 60(b), authorizing relief from a final judgment, is an appropriate remedy for a trial court's improper failure to recuse. Additionally, in *Standard Oil Co. Of Cal. V. United States*, 429 U.S. 17 (1976), this Court ruled that an appellant may file a motion to vacate in the trial court pursuant to Rule 60(b) even after the appeal had been decided by the Supreme Court.

Judge Boroff's sua sponte recusal is all the more reason why Petitioner's writ of certiorari should be granted; however, in the alternative it is just as appropriate for this Court to remand this case

with instructions for Bankruptcy Judge reassigned to this case, the Honorable William C. Hillman, to issue an Order to Show Cause why the final fee award of Mintz & Levin should not be vacated. Judge Boroff's sua sponte recusal has created just as ripe an issue for this Court's consideration as White's original appeal of Mintz & Levin's final fee award given that said recusal is inextricably intertwined with the issues on appeal.

White's Writ Should Be Granted

Mintz & Levin began its employment for the estate with unwaivable actual conflicts of interest requiring disgorgement of all fees. Then, as the case progressed, Mintz & Levin became further conflicted by leading the prosecution of the Bankruptcy Court's sua sponte sanctions against Harold Bowers [4]. In the aftermath Mintz & Levin billed the estate to negotiate and author the sanction settlement agreement with Mr. Bowers [5] after claiming authority to do so under the Bankruptcy Court's power to levy sua sponte attorney fee sanctions pursuant to case law and Rule 9011 [6]. Now,

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4 Appellant's BAP Appendix, pg. 12, ln. 15 - 17 - Docket #891: Transcript Mintz & Levin final fee hearing.

5 BC Docket #767, pg. 8 - Joint Application for Order Approving Settlement Agreement, signed and submitted by Richard Mikels, Bankruptcy Department Chair at Mintz & Levin.

6 BC Docket #767, pg. 1.

concerned over the appearance of impropriety the Bankruptcy Court has recused itself from further participation in this case.

The simplest remedy to these multiple maladies is the reversal of Mintz & Levin's final fee order due to unwaivable actual conflicts of interest between the estate and its co-counsel which in turn impaired and conflicted Mintz & Levin's dual representation of the estate and Bankruptcy Court while prosecuting the Bankruptcy Court's sua sponte sanctions.

Respectfully submitted on November 17, 2010, by

Robert White

Robert White - pro se

Addendum #1

United States Bankruptcy Court
District of Massachusetts

In re:	)	
	)	
CK LIQUIDATION CORP.	)	Chapter 7
	)	
Debtor	)	Case No. 03-44906-HJB
	)	

ORDER OF RECUSAL

The Court hereby recuses itself from Case Number 03-44906 and any associated Adversary Proceedings and directs the Clerk to reassign the aforementioned Case pursuant to Massachusetts Local Bankruptcy Rule 5001-1(d).

Dated: October 1, 2010

By the Court,
/s/Henry J. Boroff
Henry J. Boroff
United States Bankruptcy Judge

CC: Debtor, Counsel to the Debtor, United States trustee, chapter 7 trustee, Counsel to the Official Committee of Unsecured Creditors

Addendum #2

United States Court of Appeals
For the First Circuit

No.09-9020

IN RE: CK LIQUIDATION CORPORATION, d/b/a Baystate Technologies, Inc. f/k/a Cadkey Corporation

Debtor.

ROBERT WHITE
Appellant,
v.
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C.
Appellee.

Before
Lynch, Chief Judge, Torruella *, Boudin, Stahl, Lipez, Howard and Thompson, Circuit Judges.

ORDER OF COURT
Entered: November 1, 2010

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court: /s/Margared Carter, Clerk.

* Judge Torruella is recused and did not participate in the determination of this matter.

cc: Robert Storey White, Erin T. Fontana, Stephen Moeller-Salley, James W. Wilton, Charles Azano, Richard E. Mikels, Eric Kempton Bradford, Christopher M. Candon.